



**FILED**  
1-21-14  
04:59 PM

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Application for California-American Water  
Company (U210W) for Approval of the  
Monterey Peninsula Water Supply Project and  
Authorization to Recover All Present and  
Future Costs in Rates

A.12-04-019  
(Filed April 23, 2012)

**JOINT BRIEF ON GOVERNANCE COMMITTEE  
AND NON-IMPAIRMENT OF COMMISSION JURISDICTION**

Sarah E. Leeper  
Nicholas A. Subias  
California American Water  
333 Hayes Street, Suite 202  
San Francisco, CA 94102  
For: California-American Water  
[sarah.leeper@amwater.com](mailto:sarah.leeper@amwater.com)  
(415) 863-2960

David C. Laredo  
De Lay & Laredo  
606 Forest Avenue  
Pacific Grove, CA 93950-4221  
For: Both the Monterey Peninsula Water  
Management District and the City of Pacific  
Grove  
[dave@laredolaw.net](mailto:dave@laredolaw.net)  
(831) 646-1502

Russell M. McGlothlin  
Brownstein Hyatt Farber Schreck, LLP  
21 East Carrillo Street  
Santa Barbara, CA 93101  
For: Monterey Peninsula Regional Water  
Authority  
[rmcglathlin@bhfs.com](mailto:rmcglathlin@bhfs.com)  
(805) 963-7000

Charles J. McKee  
County Counsel  
County of Monterey  
168 West Alisal Street  
Salinas, CA 93901  
[mckeecj@co.monterey.ca.us](mailto:mckeecj@co.monterey.ca.us)  
(831) 755-5045

Dated: January 21, 2014

## TABLE OF CONTENTS

	Page
I. Introduction.....	1
II. The Governance Committee Agreement Does Not Impair the Commission’s Jurisdiction.....	2
A. The Category A Decisions—the Only Decisions that are Binding Upon Cal-Am—are Limited to Subject Matters That the Commission is Unlikely to Decide .....	2
B. Category B and Category C Recommendations Are Not Binding on Cal- Am, but Do Provide for Transparency and Public Input .....	3
III. The Agreement was Amended to be Consistent with the New Phase II Process for the GWR Decision .....	5
IV. The Governance Committee is Important for Achieving a Successful Project .....	6
V. Conclusion .....	6

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Application for California-American Water  
Company (U210W) for Approval of the  
Monterey Peninsula Water Supply Project and  
Authorization to Recover All Present and  
Future Costs in Rates

A.12-04-019  
(Filed April 23, 2012)

**JOINT BRIEF ON GOVERNANCE COMMITTEE  
AND NON-IMPAIRMENT OF COMMISSION JURISDICTION**

**I. Introduction**

Section 7 of the November 4, 2013 Administrative Law Judge’s Ruling Setting Forth Questions to Be Addressed at the Hearings on Proposed Settlement Agreements provides that “. . . . certain language in the proposed agreement appears to impede Commission jurisdiction and transfer such authority from the Commission to the Governance Committee . Parties must brief jurisdictional issues in the opening and reply briefs on the proposed Settlement Agreements. . .” This brief addresses this matter.

The Governance Committee for the Monterey Peninsula Water Supply Project (“MPWSP”) is a committee formed by agreement among the Monterey Peninsula Regional Water Authority, the Monterey Peninsula Water Management District, the County of Monterey, and California American Water Company (“Cal-Am”). The three public agencies share voting power and Cal-Am participates in a non-voting capacity. The public agencies and Cal-Am created the Governance Committee to ensure local transparency respecting project decision-making and to afford the community’s elected representatives an opportunity to provide input on aspects of the MPWSP that were anticipated to be beyond subject matters upon which the California Public Utilities Commission (“Commission”) would issue a direct decision. For the

reasons discussed herein, the Governance Committee Agreement (“Agreement”)<sup>1</sup> does not impede the Commission’s jurisdiction or transfer the Commission’s jurisdiction to the Governance Committee.

## **II. The Governance Committee Agreement Does Not Impair the Commission’s Jurisdiction**

In developing the Agreement, the parties were careful to avoid any duplication or impairment of the Commission’s jurisdiction over Cal-Am and its oversight of the MPWSP. For example, section I of the Agreement sets forth an overarching deference to the Commission’s jurisdiction. Specifically, it states:

Cal-Am’s entry into this Agreement is expressly conditioned upon its legal obligations to abide by the orders and decisions of the California Public Utilities Commission (“CPUC”). Therefore, should the CPUC order Cal-Am not to participate in this Agreement, Cal-Am shall be relieved of all obligations set forth in this Agreement and this Agreement may be terminated by Cal-Am upon such CPUC order. Further, if the CPUC issues any order or decision that conflicts with any particular provision of this Agreement, Cal-Am shall be relieved of any and all obligations to abide by the conflicting provision of this Agreement.

The parties included this provision to clarify that the Agreement is subordinate to the Commission’s jurisdiction and to any specific order issued by the Commission.

### **A. The Category A Decisions—the Only Decisions that are Binding Upon Cal-Am—are Limited to Subject Matters That the Commission is Unlikely to Decide**

The parties also drafted the Agreement’s substantive provisions to avoid any conflict with the Commission’s jurisdiction. The Agreement divides the subject matters for which the Governance Committee will issue decisions into three categories. (Agreement, § V.A.) Only Category A decisions impose any binding obligation upon Cal-Am. For these decisions, once the Governance Committee issues a determination on the subject matter, Cal-Am is obligated to

---

<sup>1</sup> For the Commission’s convenience, a copy of the First Amended and Restated Governance Committee Agreement for the Monterey Peninsula Water Supply Project is attached hereto as “Exhibit A.”

abide by the determination unless, of course, the determination were to conflict with any order issued by the Commission.

Originally, there were four subject matters within Category A: (1) the GWR decision, (2) selection of a value engineer, (3) approval of architectural renderings, and (4) procurement of alternative power at equal or less costs to conventional power. With the bifurcation of the proceeding in A.12.04.019 into two phases so that the GWR decision may be made by the Commission, the parties revised the Agreement to remove the GWR decision from the Category A subject matters.

The remainder of the subjects in Category A concern matters, which, but for the Agreement, would be made solely by Cal-Am without public input. (See Agreement, § V.A.) For example, without the existence of the Agreement, Cal-Am would select a value engineer for the MPWSP on its own, without public involvement, and the costs associated with the value engineer would only be reviewed at a later general rate case for reasonableness. Value engineering of the MPWSP is important to the community, and thus, it is reasonable that the community be allowed to participate in the selection of the value engineer.

The two other matters within Category A—approval of architectural renderings and procurement of alternative power—are matters that will be decided after issuance of the CPCN approving the MPWSP. Indeed, the express terms of the Agreement state that these decisions will be made by the Governance Committee “subsequent to the issuance of the CPCN.” Like the selection of the value engineer, in the absence of the Committee, these decisions would be made by Cal-Am in its sole discretion, without the community’s input. Cal-Am’s agreement to accept the community’s decisions on these topics illustrates its commitment to collaborate with the community in order to develop a successful and broadly supported project.

B. Category B and Category C Recommendations Are Not Binding on Cal-Am, but Do Provide for Transparency and Public Input.

All other topics to be addressed by the Governance Committee—Category B and Category C Decisions—allow the Governance Committee to make recommendations to Cal-Am

regarding how to proceed. Cal-Am, however, is not required to accept any recommendation issued by the Governance Committee on these subjects. If Cal-Am rejects a recommendation by the Governance Committee respecting a Category B topic, Cal-Am must provide a written statement of its reasons for the rejection. Cal-Am is not required to provide a written statement of its reasons for rejecting a Category C recommendation. (Agreement, § V.A.)

There are various subject matters that fall within Categories B and C, the majority of which the Commission—and the community—would not have the opportunity to weigh in on without the process afforded by the Agreement. (See Agreement, § V.D.) The Agreement provides full transparency for the public to consider and provide input on these key decisions that are fundamental to the community's concerns. For example, Cal-Am recently retained the design-build contractor for the desalination project. The Agreement required Cal-Am to solicit the Governance Committee's recommendation on both the initial scope of qualifications and ultimate contracting terms for the contractor. In both instances, the Governance Committee generally agreed with Cal-Am's proposal, but it also offered recommendations that Cal-Am accepted and incorporated to improve the overall decision. This type of community engagement would not have occurred without this Agreement.

Importantly, the Governance Committee's decisions on these topics do not impede the Commission's jurisdiction. These topics involve subject matters that would not be directly decided by the Commission. Rather, Cal-Am would make decisions on these topics independently without Commission or community input, and thereafter its decisions would only be subject to reasonableness review for cost reimbursement. Moreover, as noted, the Governance Committee's recommendations on Categories B and C topics are non-binding. Ultimately, the Commission alone issues determinations of reasonableness. All that the Agreement provides is that if Cal-Am chooses not to follow a recommendation by the Governance Committee, any party may raise the issue for review by the Commission during Cal-Am's next general rate case. In other words, the Agreement expressly acknowledges the Commission's jurisdiction to review the reasonableness of Cal-Am's decision and receive input from any of the public entities that disagree with Cal-Am's decision. Instead of impairing the

Commission's jurisdiction, this process simply provides the Governance Committee with an opportunity to provide recommendations on critical decisions concerning the MPWSP and acknowledges the public agencies' opportunity to address any disagreements with Cal-Am to the Commission.

### **III. The Agreement was Amended to be Consistent with the New Phase II Process for the GWR Decision.**

Cal-Am's original application for the MPWSP contemplated a decision-making process whereby Cal-Am would be authorized by the CPCN to seek approval through an advice letter to build a smaller desalination facility in combination with a recycled water/groundwater replenishment ("GWR") project. Under this circumstance, Cal-Am and the public agencies to the Agreement agreed that it was appropriate for the community to make the decision whether to request approval of the GWR project by advice letter so long as, among other conditions, the GWR project was no more expensive than the desalination project on a per acre-foot basis. Hence, as noted above, this determination was included in the initial version of the Agreement as a Category A decision to allow the community to participate in this important decision.

Following the Commission's GWR workshop and discussions between Cal-Am, other settling parties, the Division of Water and Audits, and other Commission staff, however, it became apparent that the GWR decision would require significant discretionary decisions by the Commission, which were not appropriate for approval thorough an advice letter process. The Phase II process was therefore agreed upon by the settling parties so that the Commission could issue a decision on all discretionary matters pertaining to the GWR decision. As explained during the hearing on the Settlement Agreements, the advice letter process would only be used after a Commission decision on GWR for confirmation of later-in-time showings that were non-discretionary in nature. (RT, pp. 2198:12-2199:14.)

Because the public agencies that are members of the Governance Committee will now have a full opportunity to review and comment on the GWR matter before the Commission during Phase II, the parties agreed that it is no longer appropriate for the Governance Committee to issue a determination relating to GWR as a Category A subject matter. Accordingly, the

Agreement was amended by all parties to provide at Section V.F that the Committee may issue an opinion on GWR to be transmitted to the Commission for consideration during Phase II. The Governance Committee's opinion would be non-binding on Cal-Am and would only be provided to the Commission to communicate the committee's view of the matter. Therefore, the Commission's jurisdiction is not compromised.

#### **IV. The Governance Committee is Important for Achieving a Successful Project**

In drafting the Agreement, Cal-Am and the public agencies intentionally avoided duplication or impairment of the Commission's jurisdiction for the reasons stated above. However, the members of the committee are hopeful that the Commission will recognize the important role that the Governance Committee serves in achieving a successful project. Prior efforts to solve the Monterey Peninsula's water supply problem, including the prior "Regional Project" failed, in part, because of the perceived lack of public transparency on critical project decisions and lack of opportunity for meaningful input and participation of representatives that are elected by, and directly accountable to, the customers that will be served with water from the water supply solution. Through earnest good will and collaboration, the parties created the Governance Committee to ensure that essential transparency and community input is in place for the MPWSP.

#### **V. Conclusion**

For the reasons stated above, the parties to this brief respectfully request that the Commission accept the Governance Committee as an essential component of the strategy to develop the MPWSP consistent with community values.

Dated: January 21, 2014

*/s/ Russell McGlothlin*

---

Russell M. McGlothlin, Attorney  
Brownstein Hyatt Farber Schreck, LLP  
21 East Carrillo Street  
Santa Barbara, CA 93101  
For: Monterey Peninsula Regional Water Authority



Dated: January 21, 2014

*/s/ David C. Laredo*

---

David C. Laredo, Attorney  
De Lay & Laredo  
606 Forest Avenue  
Pacific Grove, CA 93950  
For: Both the Monterey Peninsula Water  
Management District and the City of Pacific Grove

Dated: January 21, 2014

*/s/ Sarah E. Leeper*

---

Sarah E. Leeper, Attorney  
Nicholas A. Subias, Attorney  
California American Water Company  
333 Hayes Street, Suite 202  
San Francisco, CA 94102  
For: California-American Water Company

Dated: January 21, 2014

*/s/ Charles J. McKee*

---

Charles J. McKee  
County Counsel  
County of Monterey  
168 West Alisal Street  
Salinas, CA 93901  
[mckeecj@co.monterey.ca.us](mailto:mckeecj@co.monterey.ca.us)  
(831) 755-5045